

82431-2

*Response TO  
State's Supplemental  
Brief*

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

JAMES D. RIVARD, Petitioner

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SUPREME COURT  
STATE OF WASHINGTON

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MOTION FOR LEAVE TO SUBMIT RESPONSE TO STATE'S  
SUPPLEMENTAL BRIEF

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A. RESPONDENT'S MOTION

Mr. Rivard requests the court grant permission to file the attached Brief in Response to the State's Supplemental Brief pursuant to RAP 13.7(d).

Mr. Rivard requests leave to file the brief because in its Supplemental Brief, the State made several misstatements of the facts and law, mischaracterizations of governing caselaw, and confused the two critical separate, and distinct issues present in this case. Mr. Rivard requests leave to file this brief, in order to be of assistance to this Court in analyzing the issues presented.

B. STATE'S RESPONSE BRIEF MISCHARACTERIZES THE FACTS AND THE LAW RELATED TO THE ISSUES PRESENTED.

1. THE STATE'S ANALYSIS REFUSES TO RECOGNIZE THE DISPOSITIVE ISSUE IS THAT THE SENTENCING COURT WAS WITHOUT AUTHORITY TO SUSPEND MR. RIVARD'S RIGHT TO POSSESS FIREARMS.

In its Supplemental Brief, the State presents several statutory definitions that provide the underpinnings for its analysis, but the State omits the effective dates of the statutes. This is for the simple reason that the State's position is based upon the untenable position that the date of the crime is irrelevant. The State refuses to acknowledge this issue, and

instead urges this Court to ignore the sentencing court's lack of authority to suspend Mr. Rivard's gun rights. The State's reasoning appears to rest upon the idea that even if the sentencing court was without authority to suspend Mr. Rivard's right to possess firearms, that authority or lack of authority was irrelevant because Mr. Rivard was convicted of Vehicular Homicide, which is classified today as a Class A felony, and no Class A felons are ever eligible to possess firearms.

The State's position ignores or reveals a lack of understanding of critical legal principles at issue in this case. This Court must begin with the analysis of whether the sentencing court had the authority to suspend Mr. Rivard's right to possess firearms.

2. THE AMENDMENTS TO RCW 9.41.040 ARE  
IRRELEVANT TO THE ANALYSIS OF THIS  
CASE.

The law in effect at the time a criminal offense is committed controls the disposition of the case. *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). Court action imposing an invalid or unauthorized sentence is void. *See State v. Paulson*, 131 Wn. App. at 588. Moreover, it is the obligation of a court discovering a sentencing error to correct it. *State v. Cayenne*, 139 Wn. App. 114, 118, 158 P.3d 623 (2007).

What the State obviously fails to understand is the dispositive issue: if the sentencing court was without authority to suspend Mr. Rivard's right to possess firearms, which was not discovered until this case was before the Court of Appeals, Mr. Rivard would have never petitioned for the restoration of his rights. He would not need to, because he would have never "lost" his right to possess a firearm. In other words, this case is no longer a "petition to restore the right to possess a firearm" case, because his rights should have automatically been restored as a matter of law.

If the sentencing court had provided a sentence that was authorized by law and that did not purport to suspend his firearm rights, Mr. Rivard would not be before this Court today. Nor would he be required to petition any court, at anytime, for the right to possess a firearm because the right would have been automatically restored at the termination of the DOC supervision. His Second Amendment right to bear arms would have been restored automatically as a matter of law, and thus he would not be subject to prosecution for possession of a firearm.

The State's position in its Supplemental brief seems to argue the exact opposite: because Mr. Rivard's crime is now classified as a Class A, he shall forever be in jeopardy of arrest for being a felon in possession of a firearm. The State's position has wide-ranging ramifications: *any* Class B

felon whose crime was subsequently reclassified as a Class A would be in jeopardy of prosecution for a felon in possession of firearm, regardless of whether a court restored those rights.

This position presents a spectacular panoply of constitutional issues, and would most certainly run afoul of due process and ex post facto protections for those convicted felons. The State's position is simply untenable.

3. THE LAWS IN EFFECT AT THE TIME OF THE CRIME DETERMINE THE CLASSIFICATION OF THE CRIME, AND THAT CLASSIFICATION DOES NOT CHANGE, REGARDLESS OF SUBSEQUENT STATUTORY AMENDMENTS.

In its analysis, the *Rivard* majority concluded that because the legislature can amend the firearm possession regulations, Mr. Rivard may be considered a class "A" felon. This was a leap of logic, and the State makes the same mistake. This faulty analysis confuses two separate and distinct temporal concepts: (1) the amendments to the restoration of gun rights are applied at the time of the petition; and (2) the classification and consequences attendant to a felony remain as they existed on the date of the crime.

The State, and the *Rivard* majority confused these two concepts, treated them as one, and found a causal relationship that does not exist:

that because the gun rights restoration process may change and petitioners are subject to the new requirements, therefore substantive changes in crimes, such as felony reclassification, also apply to a petitioner seeking firearm rights restoration.

- a. The *Ex Post Facto* Clauses Of Both The Federal And State Constitutions Prohibit Increasing The Quantum Of Punishment For A Crime After It Is Committed.

It is well-established that the legislature may amend the gun rights restoration process and statutes without running afoul of *ex post facto* laws. But the legislature may not change the consequences attendant to a crime and impose those consequences retroactively after the date the crime was committed. The *ex post facto* clauses of the state and federal constitutions prohibit the State from enacting any law that imposes punishment for an act that was not punishable when committed, or which increases the quantum of punishment for the offense after the crime was committed. U.S. Const. art. 1, § 10; Const. art. 1, § 23; *State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994).

In its brief opinion, the *Rivard* court concluded “[Mr. Rivard] is not entitled to have his right restored because he has been convicted of a crime which is classified as a class A felony.” *Rivard*, 193 P.3d at 197.



The court's opinion failed to discuss or analyze the effect of the legislature's reclassification of vehicular homicide, the change from former RCW 46.61.520(2) (1993) to the current statute. Certainly, increasing the classification of a felony from a "B" to an "A" increases the quantum of punishment for the offense. The *Rivard* court's implicit conclusion that applying this subsequent change of classification does not increase the punishment is novel, untenable, and contrary to well-settled law.

Moreover, the court's conclusion that Mr. Rivard was convicted of a class "A" felony is wrong. The record clearly indicates that the trial court recognized that Mr. Rivard's felony was a class B, because the sentencing court did not impose punishment consistent with a class A felony. And yet on the date of sentencing, vehicular homicide had already been reclassified as a Class A. If the sentencing court and the State had considered Mr. Rivard as a class "A" felon, he would have been ineligible to receive the first time offender sentence the court imposed, and certainly an appeal would have followed.

- b. Under RCW 10.01.040, the “savings clause”, Mr. Rivard’s vehicular homicide remains a Class B felony.

In addition to the *ex post facto* clause requiring that the classification on the date of the crime will forever dictate the classification of the crime for the particular offender, the savings clause provides additional support for this legal principle.

Under the “saving clause,” Mr. Rivard’s conviction for vehicular homicide remains a Class B felony, despite the subsequent legislative reclassification:

... Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act....

RCW 10.01.040; *see also State v. Lindsey*, 194 Wash. 129, 132, 77 P.2d 596 (1938) (court committed error in sentencing under a subsequently enacted law when the crime was committed prior to amendment); *State v. Kane*, 101 Wn. App. 607, 5 P.3d 741 (2000) (in the absence of a contrary expression from the legislature, all crimes are to be prosecuted under the law existing at the time of their commission); *In re Hartzell*, 108 Wn. App. 934, 945, 33 P.3d 1096 (2001) (when the

sentence for a crime is increased during the period within which the crime was allegedly committed, and the crime was committed before the increase went into effect, the lesser sentence must be imposed.)

The Legislature failed to express a contrary intention in the amendment reclassifying vehicular homicide from a class B to a class A felony.

While caselaw indicates that the gun rights restoration statute is regulatory and therefore not part of an offender's punishment, no case law exists contradicting the explicit language of the savings clause: "*forfeitures* incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment..." RCW 10.01.040 (emphasis added). Under the plain language, the loss of one's right to possess a firearm is a forfeiture. A "forfeiture" is defined as "something to which the right is lost by the commission of a crime or fault or the losing of something by way of penalty." Black's Law Dictionary, 584 (5<sup>th</sup> ed. 1979). The loss of the right to possess firearms as a result of a crime constitutes a forfeiture. Under the savings clause, this forfeiture must be enforced as if the vehicular homicide statute had not been reclassified. As a result, Mr. Rivard's conviction should be considered a class "B" felony, and thus he is eligible for restoration of his right to possess firearms. RCW 9.41.040(4)(b)(i).

C. CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals decision, and order that Mr. Rivard's right to possess firearms be reinstated.

Dated this 5<sup>th</sup> day of June, 2009.

  
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Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 25923-4-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JAMES D. RIVARD,	)	
	)	
Petitioner.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on June 5, 2009, I mailed copies of the Motion for Leave in this matter to:

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and to :

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Signed at Seattle, Washington on June 5, 2009.

  
Catlin Gibson  
Legal Assistant